

IN THE MATTER OF ARBITRATION BETWEEN

Minneapolis Public Schools,

Employer,

and

AFSCME Council 5,
Local 56,

Union.

DECISION AND AWARD

BMS CASE NO. 05-PA-1233

ARBITRATOR:

Stephen A. Bard

DATES OF HEARING:

December 16, 2005 and
January 10, 2006

PLACE OF HEARING:

School Board Offices,
Minneapolis, Minnesota

DATE OF MAILING OF POST-HEARING BRIEFS:

January 31, 2006

DATE OF DECISION AND AWARD:

February 22, 2006

GRIEVANT:

Gwen Lamin

APPEARANCES:

For the Employer:

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For the Union:

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INTRODUCTION

This matter came on for arbitration before Neutral Arbitrator Stephen A. Bard, on December 16, 2005, and January 10, 2006 at 9:00 a.m. in Minneapolis, Minnesota. The Employer was present with its witnesses and was represented by Ms. Patricia Maloney. The Union was present with its witnesses and was represented by Ms. Joyce Carlson.

The parties waived any time limits in the collective bargaining agreement governing the issuance of an arbitrator's award and stipulated that there were no issues of timeliness or arbitrability and that the matter was properly before the arbitrator for a decision on the merits. Testimony and exhibits were taken at the time of the hearing and at the conclusion thereof the parties agreed to simultaneously serve and submit briefs on January 31, 2006.

ISSUES

1. Did the Employer violate the Collective Bargaining Agreement when it terminated the employment of the grievant?
2. If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

The following provision of the Collective Bargaining Agreement is relevant to a decision of this case.

ARTICLE XX. Employee Discipline

- A. The District shall discipline employees only for just cause....
- B. The principle of progressive discipline shall be applied when appropriate.

RELEVANT CIVIL SERVICE RULES

The following provisions of the Civil Service Commission are relevant to a decision of this case:

Rule 11.03

Cause for Disciplinary Action

The two primary causes for disciplinary action and removal are substandard performance and misconduct.

A. Substandard Performance

1. Employees who are unable or unwilling to perform their job tasks at minimum acceptable standards are subject to disciplinary procedures.

B. Misconduct

The following activities are examples of misconduct, which may be cause for disciplinary action.

1. Tardiness and absenteeism
4. Insubordination (disobedience, abusive language or behavior)
- 10. Discourtesy to public or fellow employees.
1. 18. Violation of department rules, policies, procedures or City ordinance.
20. Other justifiable causes as specified.

FINDINGS OF FACT

The Arbitrator finds that the following facts are either not in dispute or have been established by a fair preponderance of the evidence by the party having the burden of proof.

1. The grievant, Gwen Lamin, was a long term employee with the Minneapolis Public Schools, (“the District”), having been employed as a School Health Care Assistant (“HCA”) for almost 15 years. She served most of the employment at a single school. She left that school under disputed circumstances. There was some testimony concerning a clash with the principal at that school.

2. The grievant has suffered from anxiety for many years and has been treated for it. From time to time she has taken various antidepressants for this condition and has been under medical care for it.
3. The Grievant was terminated by the District on October 26, 2004 for the following stated reason: “violation of one or more of the following Civil Service Rules: 11.03 A or A1 or 11.03B or B1 or B4 or B10 or B18 or B20.”
4. Prior to the discharge, the Grievant had received progressive discipline including the following:

<u>Date</u>	<u>Issues</u>	<u>Consequence</u>
2/23/02	Discrepancies in time card; Tardiness	Directive to correct time cards and be on time for work
11/11/02	Failure to attend required training	Written warning
11/18/02	Performance and attendance	Directives and warning
12/6/02	Insubordination, inappropriate conduct, tardiness and absenteeism	Loudermill hearing
12/9/02	Same as above	Written reprimand and warning directive to adhere to expectations
10/7/03	Administration of medications to students without following District procedures (safety violation), attendance, rudeness, and insubordination	Loudermill hearing
11/25/03	Same as above	5 day suspension without pay
12/23/03	Grievance filed AFSCME drops grievance	Denied by District 2/23/04 Mediated: 5/18/04
9/20/04	Poor attendance	Loudermill Hearing
10/04/04	Failure to identify herself on the phone; insubordination consisting of using perfume after having been directed not to;	Grievant was directed not to wear any scented products to work

failure to follow District policy on reporting
child abuse; attendance

5. The conduct that ultimately resulted in the Grievant's termination began when she was transferred after the start of the 2004-05 school year to the Ramsey International Fine Arts School. Ramsey is a K-8 school which enrolls about 987 students. About 140 of the students at Ramsey have respiratory health problems such as asthma and allergies.
6. In the fall of 2004, student health services at Ramsey were provided by a school nurse (Julia Bennett, RN), who was present in the building in the mornings on Monday, Wednesday, and Friday, and a health assistant (Grievant Gwen Lamin) who worked Monday through Friday from 10 AM to 3:30 PM. The health assistant practices under the nurse's license. Thus the school nurse is professionally responsible, and potentially liable, for the health assistant's mistakes.
7. Among other things, the Ramsey Health Services Department was responsible for administering student medications, monitoring students with serious chronic health conditions such as asthma and diabetes, providing first aid, and serving as an emergency team when a student was having a medical incident, such as an asthma attack.
8. The Ramsey health office is a small enclosed space. The staff in the health office are in close physical proximity to students who are receiving treatment. If a staff member is wearing something that triggers a student's asthma or allergies, such as perfume, the staff member could aggravate the child's condition.
9. On the Grievant's first day at Ramsey, Tuesday, September 7, 2004, Assistant Principal Aura Wharton-Beck arranged a meeting to provide the Grievant with an orientation to Ramsey and to review her expectations and the Grievant's job duties. School nurse Julia

Bennett also attended the meeting. They reviewed the job description for the health assistant, item by item, with the Grievant.

10. Asthma, allergies, and other respiratory conditions are the number one chronic health condition for children students in the School District. Accordingly, this is the subject of one entire volume of the Health Related Services Guide and is frequently discussed at meetings and training for HRS personnel, including health assistants. The Grievant attended training sessions at which these issues were discussed on March 16, 2004, May 17, 2004, and August 30, 2004.
11. The HRS Guide on Asthma details the HSA's core tasks related to students with asthma. The Guide contains a protocol for providing First Aid for Asthma which begins with a warning to be aware of what triggers the student's asthma and avoid exposure when possible. The Guide contains several pages of materials discussing how to help a child with asthma or breathing problems. Advice contained therein includes avoiding things that make asthma worse and advice not to use strong-smelling perfume around people with asthma. Health assistants are responsible for reviewing the HRS Procedures Guides and following the protocols, procedures, and directives contained therein. The School District's protocols and procedures are contained in the HRS Guides, copies of which are located in the health office of every school.
12. Notwithstanding the foregoing, there is no written rule or directive in the District which flatly forbids the use of scented products by staff, including health staff. There is a directive which strongly discourages the practice. No evidence was produced that anyone else in the District had ever been ordered not to wear scented products to work. There was testimony that it was common for classroom teachers to wear cologne or perfume. There was no

evidence that any student at Ramsey had ever had an asthma attack triggered by perfume.

Not one of the students at Ramsey with asthma had listed perfume as a trigger on his or her medical records.

13. Assistant Principal Wharton-Beck told the Grievant that she had to follow the Nurse's direction. She also emphasized the importance of good attendance. Wharton-Beck told the Grievant that the school needed her there every day since her absence would affect the whole building. The Nurse gave the Grievant a list of tasks for the next 5 school days.
14. The next day, Wednesday, September 8, 2004, the Nurse noted a strong smell of perfume on the Grievant. The Nurse asked the Grievant if she had perfume on and she said "yes." The Nurse told her that she could not wear perfume at Ramsey because it was a known trigger for asthma and allergies. On that same day the Nurse also documented that the Grievant took too long of a lunch break and reminded her that she only had a half hour for lunch.
15. On Tuesday, September 14, the Grievant called to report that she would be late to work because she "couldn't find her house keys." Later she called back and said she would not come to work at all that day. On the following day, Wednesday September 15, the Grievant was absent because of a doctor's appointment. She promised the Assistant Principal that she would call back to let her know what the doctor said, but she never called back.
16. The Nurse was unable to complete any of her nursing assignments on those two days because she had to cover for the Grievant and do her work.
17. On Thursday, September 16, the Grievant was absent but told Wharton-Beck that she would definitely be in on Friday. However, the Grievant did not report to work on Friday, September 17 or call Ramsey to report that she would be absent.

18. Although the Grievant reported to work on Monday, September 20, 2004, the AP sent a note to Neil Bowerman, the District's Labor Relations Coordinator, to request a hearing regarding the Grievant's absences.
19. On September 20, the Nurse directed the Grievant to call students to the health office for screening. The Grievant allegedly did a poor job and on one occasion did not identify herself as a health assistant when she called the students' classrooms. That day the Grievant's lunch break exceeded half an hour.
20. Between Thursday, September 22, and Friday, September 24 two incidents occurred involving medication and transportation for students which were mishandled by the Grievant.
21. From September 9 through September 24 the Nurse never talked to the Grievant about wearing scents to Ramsey because she never noticed or smelled a scent on her.
22. On Monday, September 27, 2004, the Nurse showed the Grievant a small card from Hennepin Medical Center (HMC) which stated that HMC was scent-free. The Grievant retorted that since HRS had not told her she could not wear perfume she had continued to wear perfume since they had talked about it on September 8. The Nurse told the Grievant about information which showed that perfume or fragrances may be a trigger for asthma or allergy attacks. The Grievant responded that nobody knows for sure and said she would continue to wear perfume and scented products to work. The Nurse specifically told the Grievant that she could not wear perfume at work at Ramsey. Also, based on her failure to timely complete the tasks on her "To Do" list, the Nurse felt that the amount of work the Grievant completed was inadequate.
23. On Tuesday, September 28, 2004, a girl in kindergarten reported to the Grievant that her mother had scratched her face by hitting her with a stick. The Grievant reported to the Nurse

that she had tried to contact the mother to discuss the child's report, but was unable to reach her so she contacted the uncle. The Nurse told the Grievant that it was inappropriate to try to contact the adult who inflicted the injury or to leave a message with another relative. She directed the Grievant to take the child directly to the school social worker to be interviewed.

24. The next day, the Nurse checked with the social worker to see if she interviewed the child. The Social Worker reported that she had left early the previous day and had received a vague note from the Grievant about the child that morning. Nothing in the note indicated that the situation was urgent. The Social Worker testified that this was clearly an incident of child abuse that should have been reported immediately. The Social Worker checked to see if the Grievant had informed anyone else about the incident or filed a child abuse report and found out that no one else had been informed and no report had been filed. The Social Worker testified that the Grievant should have taken the child to be interviewed by another social worker or an Administrator on back-up when the Grievant found out that she had left for the day. The Social Worker stated that she was concerned about the safety of the child after being sent home and as an experienced health assistant, the Grievant should have been familiar with and followed the District's child abuse reporting policy and procedures.

25. On Monday, October 4, 2004, Neil Bowerman conducted a Loudermill hearing for the Grievant based on the AP's note which complained about the Grievant's attendance. Prior to the hearing Bowerman reviewed the Grievant's personnel file, including her prior discipline history, as well as the materials forwarded by the AP and the Nurse's memos. At the meeting Bowerman reviewed with the Grievant her attendance, failure to follow District procedures on child abuse reporting, failure to follow protocols for a diabetic student, failure to identify herself on the phone, and wearing perfume.

26. In regard to the attendance issue, Bowerman excused some of the Grievant's absences based on the note from her doctor, but did not excuse her failure to follow the required procedure to report an absence.
27. The Grievant admitted that the Nurse had told her she couldn't wear perfume at Ramsey. The Grievant told Bowerman that she had continued to wear perfume anyway because she had not received an order from HRS saying she couldn't wear perfume. Bowerman explained to the Grievant that the Nurse had the right to assign and direct her work. Bowerman also talked about the fact that the Grievant had previously received a five day suspension without pay for insubordination and failing to follow the Nurse's directions about not wearing perfume was potentially a dischargeable offense. Bowerman told the Grievant that she could not wear scented products at work but that it was permissible to wear unscented lotions. He concluded the meeting without making any determination about what discipline was warranted for the Grievant's conduct. Bowerman considered the matter to be serious and wanted to think about the Grievant's attitude and whether her behavior was remediable. The Grievant was allowed to return to work .
28. Later that day the Grievant told the Nurse that she had on a deodorant with a slight scent. The Nurse said that was fine, but reminded her that she was not to wear scented products to Ramsey in the future. The Grievant told the Nurse that she knew that she was not supposed to wear perfume to work
29. On October 7 and 8 the Grievant failed to follow a second grade student's diabetes plan and provide appropriate care to her, thus endangering the child's health and safety. Among other things, the Grievant called the child's mother and told her that the child's blood sugar was low. The mother got panicky when she received that information because the child had had a

seizure the week before due to low blood sugar. The mother asked the Grievant if she had tested the child's blood sugar and the Grievant said "no." The Grievant then tested the child's blood sugar and then called the mother to tell her that the blood sugar was actually high.

The Grievant also mislaid the school menu which the Nurse had handed to her and on which she had calculated the student's carb count for that day's lunch.

30. On Friday, October 8, 2004, the Nurse noted a strong scent of perfume on the Grievant. The Nurse asked the Grievant if she was wearing perfume and she said :No, I'm wearing "sensual oil." The Grievant told the Nurse that at the meeting on Monday she was told she could wear deodorant and "sensual oils." The Nurse told her that whatever she was wearing smelled strongly of perfume odor and reminded her that a strong scent of anything could be a trigger for an asthma or allergy attack. The Nurse told the Grievant that her position put her in close physical proximity to students who were having allergy and asthma attacks and that was why she had directed her t not wear any scented products to work.
31. On Monday, October 11, 2004, the Nurse noticed that the Grievant again smelled strongly of perfume, to the point it permeated the Health Office. A student came into the Health Office and wrinkled his nose and asked "what is the smell in here?" The Nurse reported the situation to the AP. The AP called the Grievant to her office and she also smelled a strong scent of perfume on the Grievant. The AP asked the Grievant what she was wearing and the Grievant told her "toilet water." The AP told the Grievant this it was not all right for her to wear a scent at school and contacted Bowerman to set up a meeting to discuss the situation. The Grievant was subsequently placed on paid administrative leave pending another Loudermill Hearing.

32. Neil Bowerman conducted another Loudermill hearing for the grievant on October 26, 2004. The two issues discussed were the Grievant's continuing to wear perfume and failure to follow District rules and procedures for the diabetic second grade student. At the hearing the Grievant denied wearing any scented product including deodorant on October 11. In regard to the incident with the diabetic student, the Grievant blamed the Nurse because she couldn't find the card with child's carb counts and also claimed that she gave the missing form to the mother.
33. Neil Bowerman determined that the Grievant's continued insubordination in regard to the perfume issue and continued failure to follow HRS' policies and procedures demonstrated that her conduct was not remediable. Bowerman determined that discharge was warranted based on all of the performance and attendance issues discussed in the Loudermill hearings held on October 4 and 26, 2004. The School Board discharged the Grievant on October 26, effective October 27.
34. In response to the Arbitrator's questions, the Grievant testified that she was wearing Orange-Ginger Aroma Therapy Body Oil at Ramsey on October 11, 2004. She testified that she understood from her previous Loudermill hearing that it was all right for her to wear this type of oil. She showed a bottle of the product to the Arbitrator and he and counsel were allowed to smell it. The product definitely was scented although, in the opinion of the Arbitrator, not offensively or heavily scented. The Arbitrator was convinced that the Grievant genuinely believed that she had permission to wear such a product to work

POSITION OF THE UNION

1. The arguments of the Union in support of the grievance can be summarized as follows: The Union contends that the grievant's previous disciplines are not part of a progressive pattern

of discipline leading to her termination. Ms. Lamin was not held to a progressive pattern of discipline, based on consistent standards. Ms. Lamin was terminated for not meeting a standard that was applied to her alone. The evidence is conclusive that no other employee in the school was held to the standard Ms. Lamin was held to regarding wearing of any fragrance product.

2. The ban on fragrance was not a school-wide policy or standard that required compliance from other employees at this school site. There was no District wide policy forbidding wearing fragrance or sanctioning employees who did wear it. Classroom teachers were asked to **consider** not wearing fragrance. The instructions given to those employees who have the most contact with students (teachers) was only advisory based on the general contention that fragrance can be a trigger for some people with asthma. The Employer was unable to show a single document that required even one other employee anywhere in Ramsey School or elsewhere in the District to adhere to a fragrance ban, or be disciplined for not being fragrance free. Ms. Lamin was the only employee, out of several thousand employees District wide, who was held to this fragrance ban standard.
3. Further, Ms. Lamin was given mixed messages regarding products that were acceptable or unacceptable. In her testimony Ms. Lamin stated that she had specifically talked with the District Labor Relations Representative Bowerman, in the presence of Steward Wauneen Mgeni, in early October, 2004 and had received permission to use hair and body oils.
4. Ms. Lamin's genuine belief that she was compliant with the District's unequal standard is further bolstered by her bringing the actual products to the Arbitration Hearing. The products were examined by the District and by the Arbitrator. Ms. Lamin testified that she wore these products-olive oil for her hair and body oil for her skin--under her clothes, and that a

fragrance, if any, the products may initially have, would dissipate within a short time after application and before Ms. Lamin would report to Ramsey School for work. Ms. Lamin testified that there was a lapse of a few hours between application and her arrival at the school. Ms. Lamin thought she was in compliance with the unique standard the District required of her.

5. The evidence conclusively establishes that no student suffered an asthma episode under her care and that none of her students had fragrance as a trigger.
6. The evidence further establishes that Ms. Bennett was requested to monitor Ms. Lamin and to take detailed notes on every aspect of her job performance in order to create the appearance of a foundation for discipline. The request for this monitoring came from Employer witness Wharton-Beck, and Ms. Wharton-Beck is the best friend of Ms. Lamin's former (hostile) Principal (Holland School). The Union contends that Wharton-Beck intended to separate Ms. Lamin from her employment from the start. This interpretation of the evidence is bolstered by the circumstances of the grievant's coming to work at Ramsey. Ms. Lamin testified that when she was vacated (excessed) from her long held position at Bethune School as a result of budget cuts, she initially took a position at the Holland School in the bidding session held in early summer, 2004. Lamin testified that she was looking forward to the start at Holland, and was stunned to be informed by the Principal at Holland that she was not a welcome addition to the Holland School staff. Ms. Lamin testified that she understood that she would not be given a fair opportunity to perform her job at Holland, and realized she needed to bid out of the Holland position, hoping to find another school where she would be accepted. Ms. Lamin bid at the first opportunity in August, 2004 and was awarded the Health Assistant position at Ramsey School. Upon her successful bid into

Ramsey, she was informed by the Holland Principal that she (Lamin) had bid into a School where the Holland Principal's best friend worked as the Assistant Principal, and that the Ramsey Assistant Principal would be watching her. Ms. Lamin testified that she was deeply disturbed, but felt she had no other place to go, and so reported to Ramsey hoping for the best, though concerned that she would not receive a fair assessment at this new school. The Union contends that Ms. Lamin's concern was justified, and her hopefulness naïve. Ms. Lamin was about to run a gauntlet, a plan by Ms. Wharton-Beck to discipline Ms. Lamin even before Ms. Lamin reported to duty at Ramsey School.

7. The criteria for judging the legitimacy of a the Union's claim of unequal or disparate treatment of Ms. Lamin resulting in her termination for failure to adhere to that unequal standard is the lack of reasonableness in having this policy applied solely and only to Ms. Lamin. Ms Lamin was held accountable to different interpretations of this unequal standard. Bowerman told her she could wear body oil, and Ms. Wharton-Beck sent her home and terminated her for wearing body oil. Ms. Lamin and Ms. Mgeni testified that Lamin was not forewarned of likely termination if Wharton-Beck determined she was not in compliance with the fragrance ban.
8. It is not acceptable or allowable to apply an unequal standard without a legitimate reason for that unequal standard. It is not acceptable for that standard to be personal; it is not acceptable for the standard to be unclear in its application or purpose. The District was not able and did not try to explain why only Ms. Lamin was accountable to a fragrance policy and no one else was. The District was unable to explain why the decision to terminate Ms. Lamin seems to have been set in motion prior to Ms. Lamin coming to work at Ramsey School, or offer

testimony that the relationship between Lamin and Wharton-Beck was not affected by the relationship between Wharton-Beck and the principal at Holland School.

POSITION OF THE EMPLOYER

The Employer's arguments in defense of its actions are summarized below.

1. The School District Had Just Cause to Discharge the Grievant

A. Article XX of the Grievant's collective bargaining agreement (CBA) provides that the District shall only discipline employees for just cause and the principles of progressive discipline will apply.. The grievance AFSCME filed contesting the discharge alleged that the School District violated Article XX and Civil Service Rules. However, the CBA defines a grievance as any controversy arising over the interpretation of or adherence to the terms and provisions of the Agreement and all disciplinary actions.

The Civil Service Rules are not a term or provision of the CBA and are therefore not relevant to a traditional "just cause" analysis.

B. The term "just cause" has been defined by the courts as cause which "specifically relates to and affects the administration of the office, and must be restricted to something of substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the officer or his performance of his duties, showing that he is not a fit person to hold the office"

The basic notion of just cause is that it guarantees employees the right to be treated fairly in both the procedures followed by the employer and the substance of the employer's discipline decision. The key questions that are posed in the various tests are whether the employee did

something wrong which he or she knew or should have known was wrong and does the discipline chosen by the employer "fit the crime"?

C. Analysis of the facts of this case clearly demonstrates that the Grievant did several things that she either knew or should have known were wrong. Although the Union has attempted to narrow the supposed reason for the Grievant's discharge to the perfume issue, the District discharged the Grievant for several reasons, including insubordination, poor performance, attendance, and failure to follow the HRS's rules and procedures for providing health services to students. Analysis of the facts also clearly demonstrates that the School District properly applied progressive discipline in an effort to change the Grievant's behavior prior to discharge and warned her about the consequences if she continued the objectionable behavior.

A. **2. The School District Had Just Cause to Discharge the Grievant for Insubordination for Continuing to Wear Scented Products at Work**

A. **The Directive to Not Wear Scented Products to Work Was Reasonable.**

The Union argues that the District acted in a subjective and arbitrary fashion by only giving the Grievant a directive to not wear perfume at work. AFSCME focused on the fact that there was no District or even a school-wide policy which prohibited employees from wearing scented products at work. Although it may have been preferable for the District or Ramsey to adopt a policy prohibiting all employees from wearing scented products to work, lack of such a policy does not invalidate the individual directive given to the Grievant. HRS has recognized that perfume and other scented products can be a trigger for asthma. Although the HRS Guides do not expressly state that HRS employees may not wear

perfume, the Guide repeatedly states that staff should avoid exposing students to things that can trigger students' asthma or make it worse.

The Ramsey Health Office is a small space. The health assistant is in close physical proximity to students who have asthma and allergies. When the Nurse noticed that the Grievant was wearing perfume on September 8, 2004, it was appropriate for her to direct her not to wear perfume while at work. This directive was reasonably related to the work of the health office and was given to ensure the health and safety of the students.

Although other staff at Ramsey have contact with students who have asthma and allergies, they do not have the same type of close physical contact with such students as the health assistant has. Staff who work in the Health Office will have a disproportionate amount of exposure to students who have these chronic conditions. Also, unlike teachers or other Ramsey employees, the staff in the health office will be in close physical proximity to students who are having an asthma or allergy attack while they providing first aid or emergency assistance for the student. If the staff member is wearing something that triggers the student's asthma or allergies, such as perfume, the staff member may aggravate the child's condition. Therefore, it is reasonable to have a more restrictive rule regarding wearing perfume or scented products for the staff in the health office.

B. The Grievant Was Required to Comply with the Directive Not to Wear Scented Products

Neil Bowerman made it clear to the Grievant in the Loudermill hearing he conducted on October 4, 2004, that she had to follow the Nurse's directives, one of which was not wearing scented products to work. If the Grievant or her Union believed that management did not have the right to issue this directives to the Grievant their proper remedy was to obey the directive and file a grievance on her behalf. In fact AFSCME did not object to the

individual directive to the Grievant to not wear perfume at work until after she was discharged.

C. The Grievant Violated the Directive to Not Wear Scented Products at Work.

The Nurse and AP both testified that the Grievant strongly smelled of perfume or some scent on October 11, 2004. Even students who came into the Health Office commented upon the smell in there. At the October 26, 2004, Loudermill hearing, the Grievant denied that she was wearing any scent. She also denied violating the directive to not wear scented products. The Grievant claimed that she was only wearing “sensual oil.” At the arbitration hearing the grievant produced the product she wore to work on October 11, 2004. Although it wasn’t the same bottle of the product that she had worn on that day, she stated that it smelled the same. The product was Orange- Ginger “Aroma Therapy” body oil. The product definitely was scented. Given the fact that the name of the product indicated it was for “aroma therapy” and specified the particular aroma it had it is not credible for the Grievant to claim that she was not wearing any scent to work on October 11. Wearing Orange-Ginger Aroma Therapy Oil to work violated the directive not to wear scented products and put any children with asthma or allergies who came into contact with her at work at risk.

D. The District Warned the Grievant of the Possible Disciplinary Consequences of Her Conduct

At the Loudermill meeting on October 4, Neil Bowerman talked to the Grievant about the five day suspension without pay she had previously received for insubordination. Bowerman reminded the grievant that the Nurse had the right to direct her work. The Grievant admitted that the Nurse had told her not to wear scented products at work. Bowerman repeated that

directive and advised the Grievant that violation of the directive was a potentially dischargeable offense. The Grievant was more than adequately warned by management what the consequences could be if she continued to wear products to work.

3. The School District Had Just Cause to Discharge the Grievant for Poor Performance, Failure to Follow HRS Rules and Procedures, and Attendance

The Grievant had poor performance in terms of timely and accurate completion of assigned tasks and failure to follow HRS policies and procedures regarding child abuse reporting and care for a diabetic student. The Grievant's failure to properly fulfill these assigned tasks put students at risk. The School District can not tolerate having the Grievant in the safety-sensitive position of a health assistant.

The Grievant has been repeatedly disciplined for poor attendance. Her failure to report to work for four consecutive days (September 14 through 17) and failure to follow the procedure to report absences warrants discharge.

4. The District Used Progressive Discipline and Discharge is Appropriate.

Prior to the discharge the Grievant had received progressive discipline in the form of written directives, written warnings, written reprimand and warning, and a five day suspension without pay. In her testimony, even the Union Steward conceded that the School District had used progressive discipline with the Grievant. The Grievant violated the directive not to wear scented products to work within a few days of the October 4, 2004, Loudermill hearing. In light of the fact that the directive was reinforced at that hearing and she was told that violation of the directive was a dischargeable offense, it is not reasonable to think that the School District could change the Grievant's conduct through additional training or lesser discipline.

DISCUSSION

1. What is the relevance of the Civil Service Rules?

The District has argued that the Civil Service Rules have no bearing on this case as the Arbitrator's role is simply to determine whether there was "just cause" for discharge under the Collective Bargaining Agreement. The Arbitrator disagrees with this argument.

Civil Service Rules apply to this bargaining unit and have the same effect as reasonable work rules. It is well established that it is an inherent management right to establish reasonable workplace rules and that once established, workplace rules become part of the collective bargaining agreement. A clause prohibiting the arbitrator from adding to the terms of the contract does not preclude the arbitrator from considering established plant rules in determining whether an employee has been properly disciplined. See American Zinc Co. of Ill., 20 LA 527, 530 (Merrill 1953).

A violation of the Civil Service Rules applicable to this work force would constitute just cause for discipline. More to the point, however, is that the violation of enumerated Civil Service Rules were the *sole* grounds cited in the notice terminating the grievant's employment with the District. The specific rules cited prohibited employees from engaging in conduct that constituted any of the following:

1. Substandard Job Performance
2. Tardiness or absenteeism
3. Insubordination
4. Discourtesy to fellow employees
5. Violation of department rules, policies, or procedures

It is a well established principle of labor law that "discharges must stand or fall on upon the

reasons given at the time of the discharge” and the employer cannot add other reasons when the case reaches arbitration. *Elkouri and Elkouri, How Arbitration Works* (Sixth Edition), p. 977.

Thus, in the instant case, the discipline must be sustained or denied solely on the above stated grounds, each of which will be discussed separately.

2. Was there just cause for discharge?

Substandard Job Performance

The Arbitrator has found that the District did establish that on a number of occasions the Grievant performed her job in a less than satisfactory manner. The Arbitrator was not convinced that the excuses or justification given by the Grievant on these occasions were true or sufficient in light of the potential health risk to the students involved. On the other hand, the Arbitrator also believes that on the issue of job performance there was sufficient evidence to sustain a lesser form of discipline but, **standing alone**, not enough to justify discharge. Given the long history of service to the District in this job classification, the arbitrator believes that progressive discipline, properly applied, would have had a reasonable chance of succeeding in altering the grievant’s manner of performing her job and curing these deficiencies.

Tardiness and Absenteeism

There were clearly past issues for this Grievant with both tardiness and absenteeism. However, by the time of the discharge they did not seem to be a problem any longer and were clearly not the precipitating cause of the discharge notwithstanding that it was cited as one of the grounds for discharge. Again, **standing alone**, this would not sustain a discharge.

Insubordination

The District established by a preponderance of the evidence that the Grievant had been told on several occasions by both the nurse and Mr. Bowerman that she could not wear scented products

to work. She was also unambiguously warned that failure to obey this order could result in termination of her employment. The product that she wore to work on the occasion leading to her discharge was clearly a scented product and her explanation that she thought she could wear “sensual oils” was simply not convincing. The Arbitrator finds that the Grievant sincerely believed she had been given permission to wear the product in question but that there was no reasonable basis for that belief. The Arbitrator finds that the District established that the grievant was insubordinate by disobeying clear directives from her employer not to wear scented products to work.

The Union has raised several meritorious arguments in support of its “disparate treatment” defense. It is true that there was no rule in either the school or the District prohibiting the use of perfumes or fragrances. It is true that classroom teachers who are in more frequent contact with students are not prohibited from the use of such products. It is true that the grievant was singled out and was the only employee given such an order. It is also true that no case was cited in which the grievant’s use of scented products produced any trigger effect or adverse reaction in any student.

All of these defenses are valid grounds for attacking the reasonableness of the directive itself and the fairness of its application. It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment. *Elkouri* at 995.

The District put forth as a response to these arguments that the grievant worked in closer proximity to students than did classroom teachers and that she therefore posed a greater health risk. On the other hand, there is no rule in the District prohibiting other nurses and health assistants who are similarly situated from wearing scented products to work. The grievant was singled out in a discriminatory fashion by being the only one given this order.

The problem presented by this case is that “disparate treatment” is a doctrine generally used where an established rule is unevenly applied. In this case, there was no established rule against wearing scents or fragrances. Rather, the grievant was singled out by being given a directive by her employer that may or may not have been reasonable but was not applied to anyone else.

Just as there is a rule against the discriminatory application of workplace rules or discipline, there is another doctrine applicable to insubordination cases. That is the well established principle of “obey now and grieve later.” Arbitrators have overwhelmingly agreed that except in cases of immediate threats to the employee’s health or safety, employees must not take matters into their own hands but must obey orders and carry out assignments even when they believe those assignments are in violation of a collective bargaining agreement or are otherwise subject to challenge. Their proper remedy is resort to the grievance process for relief after carrying out the employer’s directive.

Elkouri at 262.

The grievance procedure was the proper remedy for the grievant to pursue to challenge both the reasonableness of the order not to wear scented products to work in the absence of a rule prohibiting it, and its discriminatory application only to her. There was no danger to her health or safety by obeying the order and then testing it through the grievance procedure. Her failure to do so was insubordination.

Because of the unique circumstances of the case, this particular act of insubordination, **standing alone**, might have fallen short of grounds for discharge. However, given the totality of the circumstances, grievant’s disobeying of the order regarding scented products along with the job performance and attendance and tardiness issues cumulatively constituted just cause for discharge.

DECISION AND AWARD

For the above stated reasons the grievance is denied.

Respectfully Submitted

Stephen A. Bard, Arbitrator